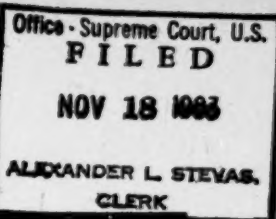


83-827



No. 83-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OKLAHOMA,

Respondent,

v.

THOMAS SCOTT KAPOCSI,

Petitioner,

**PETITION FOR WRIT OF CERTIORARI
TO OKLAHOMA COURT OF CRIMINAL
APPEALS**

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QUESTIONS PRESENTED

1. May a defendant's statements taken by police be admitted into evidence by a state trial court where defendant has made an equivocal request for counsel after being read his Miranda rights and where the police disregard such request?

2. Does the Fourteenth Amendment due process clause preclude a defendant's conviction based upon statements made by a defendant in response to explicitly coercive interrogation techniques of the police such as those used against Petitioner herein?

3. Does the search and seizure of evidence without a search warrant at a homicide scene after the victim, the defendant and all third parties have been removed from the scene and the scene is secured by police violate defendant's rights under the Fourth Amendment?

4. Does the Fourteenth Amendment due process clause allow state trial and appellate courts to ignore their own adopted rules of procedure and admit evidence which has been previously suppressed by a preliminary magistrate and which ruling has not been appealed from by the State of Oklahoma and is therefore a final order under the state rules of procedure?

5. May a defendant be tried and convicted by a jury from whom all prospective jurors who expressed a reluctance to punish have been excluded by the court or does such action by the trial court violate the holdings of *Taylor v. Duncan*, 419 US 522 (1975) and *Witherspoon v. Illinois*, 391 US 510 (1968)?

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THOMAS SCOTT KAPOCSI,

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**PETITION FOR WRIT OF CERTIORARI
TO OKLAHOMA COURT OF CRIMINAL
APPEALS**

Petitioner, Thomas Scott Kapocsi, respectfully prays that a writ of certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this proceeding.

OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 668 P.2d 1157 (Ok. Cr. 1983). [Appendix A]. The petition for re-hearing was denied in an unpublished order. [Appendix B].

JURISDICTION

The opinion of the Court of Criminal Appeals was filed August 25, 1983. A timely petition for re-hearing was filed by defendant on September 13, 1983. The Court denied the petition for re-hearing on September 19, 1983. This petition for a writ of certiorari was filed within 60

days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions are relevant to this petition and are set forth in their entirety in Appendix C:

- United States Constitution, Amendment IV.
- United States Constitution, Amendment V.
- United States Constitution, Amendment VI.
- United States Constitution, Amendment XIV.
- Rule 6, Rules of the Court of Criminal Appeals.
- Rule 6.1, Rules of the Court of Criminal Appeals.
- Rule 6.2, Rules of the Court of Criminal Appeals.
- Rule 6.3, Rules of the Court of Criminal Appeals.
- 22 O.S. § 181.
- 59 O.S. § 1338.

STATEMENT OF THE CASE

The defendant was charged and convicted of Murder, 1st Degree, and sentenced to life imprisonment. Defendant was arrested on June 17, 1980, and appeared before a magistrate fifty-two hours later on June 19. Preliminary hearing was held September 22-23, 1980. Jury trial was held May 12-14, 1981.¹

This petition for writ of certiorari seeks review of an opinion of the Oklahoma Court of Criminal Appeals affirming defendant's conviction. The following facts are relevant to review:

¹ All references to Appendix E regarding the facts herein are made as "pp. a", where pp. refers to the related page of the Appendix.

On June 17, 1980, defendant, 18 year old Thomas Scott Kapocsi, awoke and noticed that his girlfriend, Jackie, was gone. Distraught, he drove through town looking for her. During the drive Scott decided to move back with his parents; and, unable to locate Jackie, he returned to the apartment. Later, when Scott began packing, he took his rifle from the rack to the living room to clean before packing it. He got the cleaning kit out and removed the rifle bolt. Then he went to the balcony for some fresh air. While on the balcony, he saw a blue truck coming up the alley and the driver made an obscene gesture. The driver was Harold "Earl" Morgan, Jackie's husband, a large muscular man. In fear of Earl, Scott re-entered the apartment, grabbed the rifle and replaced the bolt. The chamber was empty but there was one shell in the magazine.

Carrying the rifle, Scott went to the stairway. Earl looked up, saw Scott, and said he was there to get Jackie's things. Scott told him to go away. Earl began to approach the stairs. At the front of the truck, Earl picked up a large board. He then threw the board down yelling, "You've done me wrong. I'm going to kill you with my bare fists." Earl came up the stairs and Scott retreated to his apartment. As Earl came to the open door, Scott slammed the rifle bolt open and closed hoping to scare Earl. This action chambered the shell in the magazine. Despite this noise, Earl entered and words were exchanged. By this time Scott had retreated across the living room. Scott told Earl to get out. Earl advanced saying, "Why do you have all these girls clothes? I think you're a queer." Scott replied, "Earl, man, I'm begging you to go." Earl said, "I'm sick and tired of you. I'm going to kill you." Earl moved toward Scott and from a hip-shot position the rifle fired. Earl staggered through the doorway into the hall.

Scott immediately grabbed the telephone, dialed '911' and said he had just shot a man and gave his address. The

police dispatcher then radioed the patrol officers. Officers Taylor and Burton were first on the scene and found a dead body in the second floor hall. Down the hall was an open door. Taylor went to the doorway and in the apartment he saw Scott standing by a couch where a rifle lay. Taylor entered and escorted Scott into the hall. There were no other persons in the apartment. [24a]. Scott was asked what had occurred and he said he was living with a girl and that the deceased was her husband. Officer Taylor then took Scott into the apartment and requested him to stand where he was when the rifle was fired. Officer Burton then transported Scott to jail. Officers Taylor, Darland and Coleman over the next several hours photographed and searched the apartment. During the search Darland seized a letter out of a closed notebook from a desk in the kitchen. The rifle and a spent rifle shell were also seized. [24a to 26a].

Scott was booked into jail at 9:47 a.m. [26a]. Several times he asked to use the telephone but was told he could not until he talked to the officers. [27a to 29a]. At 5:00 p.m. Taylor and Darland began their interrogation. The officers gave defendant a *Miranda* rights waiver form and had him read it and initial each line. [29a]. Reading the part which stated, "I do not want a lawyer", Scott said, "I'm thinking I will need a lawyer." Taylor said, "Don't worry about that; you can take care of that later." [29a to 30a]. The waiver form was signed at 17:00 hours. Scott hand-wrote a statement and signed it. This statement also bore the time of 17:00 hours. Scott then signed several blank papers upon which his handwritten statement was later typed. The officers again interrogated Scott, covertly tape recording the session, which took between three and four hours. The officers then began to bear down upon Scott. Officer Darland said that Scott was lying and that he could prove he was lying from the

autopsy. Officer Taylor stated that Oklahoma didn't have a death penalty but he was going to "Big Mac" Prison for a long time. Darland told Scott he was going back to his cell and he had better think about his statement as he was going to take a polygraph in the morning. [30a to 32a]. On the way to the cell, Scott said he wanted to tell the truth. They then returned to the interrogation room. It was about 9:00 p.m. Defendant was again questioned while being covertly tape recorded. At 9:50 p.m. Scott gave a handwritten statement.

Prior to preliminary hearing, counsel filed a Motion to Suppress seized evidence and the defendant's statements. The magistrate overruled this motion except for a letter seized from a notebook which was suppressed. Prior to trial, counsel filed a similar Motion to Suppress. On May 12, 1981, the trial court held a hearing at which witnesses were called and the preliminary hearing transcript was stipulated to for the purpose of that hearing. The trial court overruled all motions. Throughout trial, counsel objected to the admission of this evidence but was overruled and it was admitted. [Appendix D].

REASONS FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari To Consider If Defendant's Statements To The Police Should Have Been Admitted In Evidence Where Defendant Made An Equivocal Request For Counsel And The Police Disregarded This Request.

The defendant was arrested at approximately 9:15 a.m. and was held incommunicado all day in jail. During the day he asked twice for a telephone call and was told that he would have to talk to the detectives first. Defendant believed that only by talking to the police would he get to contact his family for help. Finally, he was taken from his

cell for interrogation. Defendant believed that after he talked to the officers he would be allowed to use the telephone. In response to the *Miranda* waiver form, he stated that he thought he needed a lawyer. Officer Taylor's response was that he should not worry, that he could take care of that later. This response lulled defendant into a false sense of security.

Petitioner's statement was an equivocal assertion of his right to counsel and the police ignored this request. This court has not directly addressed the question of whether an equivocal request for counsel brings into play the guidelines set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). However, this Court has explicitly held that there can be situations where an equivocal request could occur. In *Miranda v. Arizona*, 384 U.S. 436 (1966), it was stated,

" . . . If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45.

Plainly *Miranda* does not require any talismanic words for an accused to invoke his right to counsel.²

² See, (*Giacomazzi v. State*), 633 P.2d 218 (Alaska 1981), where accused asked when he was going to be able to talk to a lawyer or make a phone call. The court held, "(*Miranda*) states that if a suspect 'indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.' 384 U.S. at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 707. A court applying this rule must first determine whether the defendant before it did invoke his or her right to have an attorney present at the interrogation. This threshold determination may require resolution of factual conflicts, but it is plain that 'a suspect may indicate that he wishes to invoke the privilege by means other than an express statement to that effect; no particular form of words or conduct is necessary.' (*People v. Randall*), 464 P.2d 114, 118 (Cal. 1970)." 633 P.2d at 221. The Alaska Supreme Court therefore held that the accused's statement was sufficient to invoke the right to counsel.

Since *Miranda*, several federal courts have faced situations similar to the case at bar.³ In *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978), the accused, a 16-year old, when his rights were read said, "Maybe I should have an attorney." The court stated,

"Of course, there are times when it is not clear that a suspect is in fact asserting the right to counsel. Sometimes, a defendant may simply be seeking further information about his or her rights. *Miranda* gives some guidance, mandating that questioning must stop if the defendant 'indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking. . . . *Maglio* was attempting to assert his right to an attorney when he told Captain Traub that 'maybe he ought to have one.'" 580 F.2d at 205.

The court held that the accused's statements were tainted by the denial of counsel. Interestingly, the officer's reply was that counsel could not be made available until the next day. Such a statement is very similar to the police response to defendant's request. In both cases questioning continued and a statement ensued.

The states have also addressed the issue of an accused's equivocal request for counsel. With the exception of the

³ See, (*U.S. v. Clark*), 499 F.2d 802 (4th Cir. 1974) ["I had better have a lawyer," was sufficient assertion.]; (*Thompson v. Wainwright*), 601 F.2d 768 (5th Cir. 1979) ["I want to make a statement, but I want to tell it to my attorney first," was sufficient.]; (*White v. Finkbeiner*), 611 F.2d 186 (7th Cir. 1979) ["I'd rather see an attorney," was sufficient.]; (*U.S. v. Prestigiacomo*), 504 F.Supp. 681 (E.D.N.Y. 1981) ["Maybe it would be good to have a lawyer," was sufficient.]; (*U.S. v. Hinckley*), 672 F.2d 115 (D.C. App. 1982) ["I don't know. I'm not sure. I think I ought to talk to Joe Bates first." was sufficient where officer determined that Joe Bates was the attorney for the defendant's father.].

Oklahoma court in this case, the states have taken a strict stand based upon the language in *Miranda* and have held that any expression of a desire for counsel requires interrogation to cease until counsel is present.⁴ Most recently, *People v. Cook*, 665 P.2d 640 (Colo. App. March 24, 1983), held that a statement "Oh, I guess I am going to need an attorney," was a valid assertion of the right to counsel stating,

"[W]e hold that police questioning should have immediately ceased when Cook expressed a need to consult an attorney. Neither a 'sophisticated' request nor a 'legally proper form' is necessary to invoke the right to counsel. . . . In *People v. Cerezo*, 635 P.2d 197 (Colo. 1981), when the accused remarked, 'I think I better have a lawyer,' the court held that this was a clear assertion of her right to counsel. Cook's statement here that, 'Oh, I guess I am going to need

⁴ (*People v. Quirk*), 181 Cal. Rptr. 301 (Cal. App. 1982) [Accused asked state psychiatrist whether his wife had hired him a lawyer yet; found to be sufficient.]; (*People v. Enriquez*), 561 P.2d 261, 271 (Cal. 1977), [Court stated, "In *Ireland [People v. Ireland]*, 450 P.2d 580 (1969)] we stated that even an indirect indication that a suspect wants an attorney present compels an immediate cessation of the interrogation until an attorney is present."]; *People v. Rafac*, 364 N.E.2d 991 (Ill. 1977), [Indication of interest in legal counsel is sufficient.]; *People v. Woodward*, 406 N.Y.S.2d 790 (NY 1978) ["I can't afford a lawyer. May I have legal aid?" was sufficient.]; *People v. Blasingame*, 412 N.Y.S.2d 153, 155 (NY 1978) [Any act evincing an intent to obtain counsel is sufficient.]; *State v. Nash*, 407 A.2d 365 (NH 1979) ["I think I had better talk to an attorney." was sufficient.]; *Ochoa v. State*, 573 S.W.2d 796 (Tex. Crim. App. 1978) [Defendant's indication in any manner that he wished to have a lawyer is sufficient.]; *Good-nough v. State*, 627 S.W.2d 841 (Tex. App. 1982) ["I might better talk to my lawyer before I give a statement." was sufficient.].

an attorney,' was not significantly different from the statement in *Cerezo*." 665 P.2d at 643.

The case at bar presents an opportunity for this Court to give the states a clear message that the language of *Miranda* has meaning and must be enforced.

The Oklahoma court focused on defendant's admission at the suppression hearing that his statement was not a request for a lawyer. However, thereafter he testified that his statement was a comment that he would like to have a lawyer. Moreover, whatever was said at the hearing could have no bearing on what the police heard and understood at the time of interrogation. Plainly, the focus should be at the time the equivocal assertion is made and the officers understanding of it and their response to it. These officers consciously chose to ignore it. In fact, the reply of Officer Taylor indicates that he thought defendant was asking for a lawyer but if he ignored it, defendant would give a statement. This Court should make it clear that such word games by law enforcement violate *Miranda*.

Once an equivocal request for counsel is made, *Miranda* would bar further questioning regarding guilt or innocence. As was explained by the Fifth Circuit in *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir. 1979);

" . . . whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified. When and if it is clarified as a present desire for the assistance of legal counsel, all interrogation must cease until that is provided, just as in the case of an initial, unambiguous request for an attorney. And no statement taken after that request is made and before it is

clarified as an effective waiver of the present assistance of counsel can clear the *Miranda* bar." 601 F.2d at 771-72.

The case at bar affords an opportunity for this Court to adopt a procedure for dealing with an equivocal request such as that in *Thompson*.

This case also provides this Court with an opportunity to clarify the "initiation" requirement of *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Oregon v. Bradshaw*, ____ U.S. ____, 77 L.Ed.2d 405 (June 22, 1983). The state court herein determined that after the defendant made his first statement, on his walk back to his jail cell he "initiated" conversation with the police; and, therefore his second handwritten statement and the second tape recorded statement were admissible. 668 P.2d at 1160. This reasoning entirely disregards the initial *Miranda* violation and holds that such a violation may be purged of taint by later compliance with *Edwards*. This Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), stated,

"[A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, . . . the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel had been made available to him, unless the accused . . . initiates

further communication . . . with the police." 451 U.S. at 484-85.

Recently, this Court further analyzed *Edwards*, in *Oregon v. Bradshaw*, ____ U.S. ____, 77 L.Ed.2d 405 (June 22, 1983), where the Court held that even if an accused initiates a conversation, that alone will not be a waiver of his rights, stating,

"But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel,' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." 77 L.Ed.2d at 412.

Nothing in either *Edwards* or *Bradshaw* can be read as holding that conversation "initiated" by an accused purges prior police illegalities. Yet such was the holding of the Oklahoma court.

Likewise, the appellate court's reliance on the signing of a rights waiver does not follow the prior decisions of this Court. Historically, the state bears the burden of proving that an accused knowingly, voluntarily and intelligently waived his right to counsel.⁵ This requires showing "an intentional relinquishment or abandonment of a known right."⁶ A court must indulge in every reasonable presumption against waiver.⁷ Moreover, the signing of a rights waiver is not conclusive on this issue. In *Butler*

⁵ See, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

⁶ See, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁷ See, *U.S. v. Prestigiacomo*, 504 F.Supp. 681, 684 (E.D.N.Y. 1981), citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977); and, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

v. *North Carolina*, 441 U.S. 369, 373 (1979), this Court stated,

"An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver."

Proof of a signed waiver does not preclude a finding that a valid waiver did not occur,⁸ and yet the Oklahoma court so held.

This case presents this Court with an occasion to set specific guidelines regarding the assertion of the right to counsel; the procedure to be followed upon an equivocal assertion of that right; and the nexus between a prior illegality and the "initiation" of communication between an accused and the police. The Court should, therefore, grant certiorari in this case.

II.

This Court Should Grant Certiorari To Consider Whether Defendant's Statements To The Police Were The Product Of Explicitly Coercive Interrogation Techniques By The Police In Violation Of The Fourteenth Amendment Right To Due Process.

In case after case it has been stated that coerced confessions will not be permitted.⁹ Involuntary confessions

⁸ See, *U.S. v. Massey*, 550 F.2d 300, 307-308 (5th Cir. 1977) ["a valid waiver will not be presumed simply from the fact that . . . a waiver was eventually signed"]; *Oregon v. Bradshaw*, 33 Crim. L. Rptr. 3211 (June 22, 1983) [rights waiver later signed]; *People v. Rafac*, 364 N.E.2d 991 (Ill. 1977) [waiver signed]; *Giacomazzi v. State*, 633 P.2d 218 (Alaska 1981)[waiver signed].

⁹ See i.e., *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Brown v. Mississippi*, 297 U.S. 278 (1936).

as evidence lack trustworthiness because the conditions under which they were obtained could compel an innocent person to incriminate himself.¹⁰ By allowing the use of coerced confessions, courts would lend judicial sanction to the methods by which the statements were obtained and would denigrate the esteem and respect which the judiciary must be accorded to function effectively.¹¹ Coercion need not take the physical form of the rubber hose or the blackjack. Spirit and mind may be as effectively twisted to an interrogator's will as the body.¹² Mental coercion takes many forms, the most common of which (Mutt and Jeff routines, incommunicado incarceration, and physical and psychological isolation) are used frequently during custodial interrogation to secure admissions of guilt from criminal suspects.¹³

This Court is presented with a case very similar to *Haynes v. Washington*, 373 U.S. 503 (1963). In *Haynes*, the accused was held incommunicado for sixteen hours during which time his requests to call his wife were refused by telling him that he would not be allowed a telephone call until he "cooperated" with the police. Herein, defendant was held incommunicado for eight hours; and when he requested telephone calls, he was told: "You'll have to talk to the detectives first." The *Haynes* Court with real world wisdom stated, "We cannot blind ourselves to what experience unmistakably teaches: that

¹⁰ See i.e., *Lisenba v. California*, 314 U.S. 219 (1941).

¹¹ See i.e., *Townsend v. Sain*, 372 U.S. 293 (1963); *Blackburn v. Alabama*, 316 U.S. 199 (1960).

¹² See i.e., *Chambers v. Florida*, 309 U.S. 227 (1940).

¹³ See, F. Inbau & J. Reid, *Criminal Interrogation and Confessions* (2nd ed. 1967); R. Aubrey & R. Caputo, *Criminal Interrogation* (1st ed. 1965).

even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects.” 373 U.S. at 514. The state court distinguished *Haynes* stating that the accused in *Haynes* was held incommunicado for five to seven days after his statements. However, the period of time after the statements were made is not relevant to whether the statements were involuntarily made. The relevant factors to the statements made by defendant and those in *Haynes* are indistinguishable.

This Court is presented a chance to elucidate on the factors leading up to a statement by an accused which are to be considered in a determination of voluntariness. The relevant factors herein are many. Concerning incommunicado detention, Oklahoma law grants an accused the right to a telephone call before being placed in jail or within six hours thereafter.¹⁴ Defendant was not allowed a telephone call before being placed in jail or within six hours. The right to a telephone call was a subject of favorable comment in *Miranda*.¹⁵ Thus, this statutory right rises to constitutional stature whenever the right to counsel is involved.

Oklahoma law, like federal law, also mandates that an accused be taken before a magistrate without unnecessary delay.¹⁶ On the day of defendant’s arrest there were at least two arraignment dockets held after his arrest—

¹⁴ 59 O.S. S1338. [Full text in Appendix C].

¹⁵ The Court reviewing F.B.I. procedures noted, “A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell v. U.S.*, 351 F.2d 459 (1965).” 384 U.S. at 485.

¹⁶ 22 O.S. § 181. [Full text in Appendix C].

one at 1:00 p.m. and one at 3:30 p.m. Officer Darland stated that by noon he knew the cause of death and had sufficiently completed his investigation to have decided that first degree murder charges be filed. This Court has long held on the federal level that such delay by law enforcement would not be tolerated.¹⁷ As one court has stated regarding delayed arraignment:

"The standard by which the court is to judge whether the defendants' processing procedures before presentment pass constitutional muster is whether they lead to the detainment of the arrestee only so long as needed to complete 'the administrative steps incident to arrest.' *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975). After that short period of time the core guarantee of the Fourth Amendment moves into the foreground—the individual must be brought before a judicial officer who determines if probable cause exists to believe that a crime has been committed by the person detained." *Lively v. Cullinane*, 451 F.S. 1000 (U.S.D.C. D.C. 1978).

The only reason to deny defendant a telephone call and delay his arraignment was to avoid the appearance of an attorney so as to obtain these statements from him.

The testimony herein shows the police made statements which could only be interpreted as threats—about the polygraph, the death penalty, incarceration in "Big Mac" Prison, and that his story was "bullshit" which would convict him. Psychological terror tactics such as these should again be condemned by this Court.¹⁸ The

¹⁷ See, *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

¹⁸ As this Court stated in *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960), and reconfirmed in *Miranda v. Arizona*, 384 U.S. 436, 448 (1966), "... this Court has recognized that coercion can be mental as

defendant was coerced from the moment the first officer arrived until the last statement was elicited. He was marched by the bloody body three times while in shock. He was held over eight hours incommunicado. He asked to use the telephone but was refused until he talked to the officers. He was held over twelve hours before being allowed to visit with family. He was not taken promptly before a magistrate but was held 52 1/2 hours before arraignment. He was threatened by the police detectives while being questioned. When he said that he thought he needed an attorney, he was told by the police that he could take care of that later. Because of his age - 18 years - and the traumatic experience he underwent, he was not mentally capable of voluntarily making any statement. In their totality these facts paint a striking picture of coercion. This petition must be granted to rectify this constitutional violation.

III.

This Court Should Grant Certiorari To Consider Whether The Search And Seizure Of Evidence Without A Warrant At A Homicide Scene After The Victim, The Defendant And All Third Parties Have Been Removed And The Scene Is Secured By The Police Violated Defendant's Rights Under The Fourth Amendment.

The facts relating to the seizures herein are not in dispute. The testimony of Officers Taylor, Burton and Darland was that upon the arrival of Taylor and Burtoff, the defendant was removed to the hall for interrogation. The deceased was lying in the hall. There were no other persons in the apartment and there were police present to secure the premises and send for a search warrant.

well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."

This Court in *Mincey v. Arizona*, 437 U.S. 385 (1978), confronted with a newly constructed "murder scene" exception to the Fourth Amendment formulated by the Arizona Supreme Court, held that there is no "murder scene" exception to the Fourth Amendment. Recognizing the need to determine if anyone needed medical aid, the Court held that police officers could make a cursory sweep of the scene. However, once the suspect, the victim, and third parties had been removed from the scene, the police were required to obtain a search warrant to continue their investigation. The Court did note that anything seen during this "sweep" search could be used as probable cause for a search warrant. However, use as the basis for a warrant does not mean immediate seizure without a warrant.

This Court is faced herein with a situation very similar to *Mincey*. The only real difference is the length of the search under the so-called "murder scene" exception without a warrant. However, the state court's opinion in this case neither mentioned nor addressed *Mincey*. *Mincey* controls the seizure of the rifle, shell casings, and letter and the scene photographs. The Court should grant certiorari to enforce the *Mincey* decision.

The defendant does not suggest that the vision of the officers must be blinded, only that their hands be closed unless they have a warrant. It is clear that "search" and "seizure" are two separate rights. In *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971), it was stated:

"[P]lain view alone is never enough to justify the warrantless seizure of evidence . . . even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

Counsel does not object to the officers' testimony about what they saw in the apartment since it is the result of a

legitimate "sweep" search under *Mincey*. Under the exigencies of the moment, the officers had to enter and remove the defendant, see that there were no persons in need of medical attention, and check that there were no persons inside who could destroy evidence. Once this had been done the exigencies dissipated. The apartment had only one entrance which could have been secured by any one of the half dozen policemen on the scene. No obstacles were present to the securing of a search warrant since less than ten minutes from the scene were some two dozen judges empowered to issue search warrants.

Mincey is even more persuasive when applied to the seizure of the letter. This letter was found inside a closed spiral notebook in the kitchen, not the living room where the shooting occurred. In fact, it was a page of the notebook which had to be torn out by the officer when he seized it. Of course before the officer could know to seize it, he must have read all the pages of the notebook. Counsel objects to both the search for the letter and its seizure. The search is objectionable since it went beyond the "emergency sweep" outlined in *Mincey*, and the seizure because no warrant was obtained under *Mincey*. Pursuant to the holding of *Wong Sun v. United States*, 371 U.S. 471 (1963), the letter and its production at the time of trial were the "fruits of the poisonous tree". The State bears the burden under *Wong Sun* of proving the "attenuation of the taint"; this burden was never placed upon nor carried by the State.

The appellate court's contention that the rifle and shell casings were in plain view does not validate their seizure. Defendant admits that the officers saw them upon entry; however, they were not seized until after the defendant was removed from the scene and it was secured. *Coolidge* and *Mincey* hold that seizures are distinct from searches

and that "plain view" does not justify a warrantless seizure. Similarly, the appellate court's argument that the letter was properly sponsored by an independent witness begs the question. But for the illegal seizure by the police, the letter would never have appeared at trial. Therefore, the physical object—the letter—was the "fruit of the poisonous tree." The witness possibly could have testified orally about the contents of the letter, but the letter itself should not have been admitted.¹⁹ This distinction was not made by either the trial court or the appellate court. Finally, the appellate court's contention that the scene photographs fairly and accurately depicted the scene does not come to grips with the fact that the police violated *Mincey* when taking the pictures. A picture illegally obtained is nonetheless inadmissible even if accurate. This court should grant certiorari to correct the state court's failure to enforce the rights granted the defendant in *Mincey*.

IV.

This Court Should Grant Certiorari To Consider Whether The Fourteenth Amendment Due Process Clause Requires State Courts To Enforce Their Own Adopted Rules Of Procedure.

The Magistrate suppressed the letter seized from the apartment under the holding of *Mincey*, finding that although the plain view search of the apartment was constitutional under *Mincey*, the seizure of the letter without a warrant and without exigent circumstances violated defendant's rights. At the conclusion of the preliminary hearing, the State gave oral notice of its intent to appeal the magistrate's suppression ruling pursuant to Rule 6, Rules of the Court of Criminal Appeals. Thereafter, the

¹⁹ See i.e., *U.S. v. Ceccolini*, 435 U.S. 268 (1977).

State did not file a written appeal as required and no appeal hearing was held. At trial, over the objection of defendant, the letter was admitted.

In order to exercise its limited right of appeal, the State must, pursuant to Rule 6.1, give oral notice at the time of the adverse ruling. This rule also requires the magistrate to enter such notice in the court docket. Rule 6.2 compels a prosecutor to perfect his appeal by filing a written appeal within five days of the adverse ruling. An appeal hearing must be held by the trial court within twenty days. Herein the prosecutor neither filed a written appeal nor was a hearing held.

When a prosecutor fails to timely file his appeal, Rule 6.3 states, "In the event the State does not file the application to appeal as provided, the State shall have waived any right to appeal from the magistrate's adverse decision. That magistrate's order shall then be final." Therefore, the Magistrate's suppression ruling herein was a final, binding order and the trial court's failure to obey the ruling was a violation of the rule. Based on the explicit language of Rule 6.3, counsel assumed that the letter was not a concern for trial and was shocked when the State made its end run around Rule 6.

Very few statutes are as clearly written as Rule 6.3. Once the magistrate's ruling became final, defendant had a due process right to rely on that ruling as the "law of the case" and the State should have abided by that decision. The crux of defendant's due process claim is that he had a fundamental right to rely on the government to follow the rules as adopted. For what is due process unless it is obedience to the procedures adopted? Rule 6.3 states that a magistrate's order unappealed from is a final order. If that order is not binding upon the trial court, how can it be called a "final order"? The term "final order" implies that

it is an enforceable order. However, the prosecutor, the trial court and the appellate court have failed to comply with or enforce this order. This Court by granting certiorari has the opportunity to require the government to follow its rules.

The more difficult issue is whether a citizen has a fundamental right to rely on government to follow its rules. History and societal values argue that this is a fundamental right. The concept of public office as a trust given by the people and the duty of an office-holder to follow the rules of office is well founded. James Madison in the *Federalist Papers*, Essay No. 50 stated, "The nature of their public trust implies a personal influence among the people, in that they are more immediately the confidential guardians of the rights and liberties of the people." Public office was considered to be a public trust and concomitant to this was the concept of public officers complying with the rules of office. This can be seen in the concepts of impeachment, ouster, and recall elections. Madison noted in Essay 62, the *Federalist Papers*, that, "No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability." Order comes when the people know they can rely on government to obey the law. From a historical view the right to trust the government and rely on its integrity was an established right recognized by the Founding Fathers.

It is equally persuasive that there are real societal values underlying this history. A government which does not follow the rules is not a government but a tyranny. From the time we are taught to follow the rules of children's games, we have learned that we are a nation of laws, not men. Public officers who have not learned to

follow the rules have, to their shame, lost the respect of the people. Over the course of time, a nation whose laws are not obeyed cannot last. The only real force we have to compel obedience of the law is respect for the law. If government does not respect the law, then the people will not. From the days of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), when Justice John Marshall declared this nation to be a government of laws and not men, to the days of *U.S. v. Nixon*, 418 US 683 (1974), where this Court declared that even the President is not above the law, the rule of law has been supreme. Both from a historical perspective and from the values of society, this Defendant had a fundamental right to have the State follow the rules. Since it is undeniable that the State has not followed the rules which it wrote, this defendant's due process rights were violated and this Court should grant certiorari.

V.

This Court Should Grant Certiorari To Consider Whether A Defendant May Be Tried By A Jury From Which All Jurors Who Expressed A Reluctance To Punish Have Been Excluded For Cause.

The jury is a most essential part of the American criminal justice system. The right to a fair trial by an impartial jury of ones peers differentiates the American system from most other systems of the world. It is imperative that the jury be truly impartial and shielded from any extrinsic factors which would prejudice them. However, during defendant's trial, the trial court broke through this shield. During voir dire, two jurors expressed some difficulty with sentencing because of defendant's age. Neither juror stated that she could not impose punishment, only that such a task would be difficult. [33a to 34a].

The Constitution guarantees the accused a trial by a jury of his peers and to this end the system seeks to provide a jury which is a cross-section of the community from which he comes. This Court noted in *Taylor v. Duncan*, 419 U.S. 522, 530 (1975),

"We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."

The Court recognized the fundamental principle underlying the jury system—the right of a citizen accused to be judged by his fellow man in a fair and impartial trial. However, this principle was not recognized by the state courts herein and certiorari should be granted to enforce this principle.

In every community there are persons who fall at various points along the punishment spectrum. There are those who would never punish and there are those who would severely punish for the most minor of offenses. Most citizens, however, fall somewhere between these extremes. The accused has the constitutional right to a jury of all persuasions. Anything less violates the fair cross-section of *Taylor*.

Both of the jurors excused for cause expressed some difficulty with the punishment phase of the trial. However, neither juror stated that they could not punish if the evidence warranted it. Neither did the trial judge inquire into such a predisposition. Along similar lines of analysis, the Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), stated:

"A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," [fn. omitted] a jury that must chose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. [fn. omitted]. Yet, in a nation less than half of whose people believe in the death penalty, [fn. omitted] a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment - of all who would be reluctant to pronounce the extreme penalty - such a jury can speak only for a distinct and dwindling minority. [fn. omitted].

If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to the penalty. [fn. omitted]. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State

produced a jury uncommonly willing to condemn a man to die." 391 U.S. at 519-21.

The Court's holding in *Witherspoon* is equally applicable to the case at bar. If this had been a capital case, these jurors could not have been excluded under *Witherspoon*,²⁰ for they did not say they could not impose punishment under any circumstance, only that it would be difficult. Neither juror should have been excused unless they had stated that under no circumstances could they have imposed punishment upon defendant.

The appellate court stated in its opinion that the jurors were excused because they expressed difficulties in reaching a decision upon defendant's guilt or innocence. The record indicates that these jurors never stated that they could not sit in judgment of guilt and punishment, only that it would be difficult. To excuse all veniremen who express such difficulties would be to incurably bias the cross-section of the community from which these jurors were randomly selected. A fair cross-section contains the faint-hearted and the strong, the just and the unjust, the strict disciplinarian and the free spirit. The *Taylor* fair cross-section standard cannot be maintained if judges are allowed to excuse veniremen who find it difficult to sit in judgment of their fellow man. Moreover, the jurors who expressed doubts about punishment would also have been very thorough in their analysis of the evidence and consideration of lesser included offenses. When they were excused, the defendant was left with a jury ready, willing and able to hand out a life sentence. This is hardly the fair cross-section contemplated by *Taylor* and *Witherspoon*. This Court can correct this derailment of the jury system by granting certiorari.

²⁰ See i.e., *Chaney v. State*, 612 P.2d 269 (Ok. Cr. 1980); *Reid v. State*, 478 P.2d 988 (Ok. Cr. 1970).

CONCLUSION

Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

NO. F-82-9

THOMAS SCOTT KAPOCSI,

Appellant,

vs.

THE STATE OF OKLAHOMA,

Appellee,

FOR PUBLICATION

File Stamped

Aug 25 1983

OPINION

BUSSEY, Presiding Judge:

In the early morning hours of June 17, 1980, the woman with whom the appellant, Thomas Scott Kapocsi, had been living left him to reconcile matters with her husband. Upon discovery of the woman's absence, the appellant embarked upon a search for her. Having failed to find her, the appellant returned to his apartment. He managed to contact the woman at her work by telephone, and was informed that she was leaving him. Subsequently, the woman's husband, the victim in this case, appeared at the appellant's apartment to retrieve some of the woman's belongings. After an exchange of words and threats, the appellant shot the victim in the chest at close range with a 30.06 caliber rifle. The victim stumbled out of the appellant's apartment into the hall where he died of the gunshot wound.

The appellant immediately telephoned the Sand Springs Police Department and reported the shooting. Upon the arrival of the police, the appellant was taken outside his apartment,

given a Miranda warning, questioned briefly and returned to the apartment to demonstrate where he and the victim were positioned when the shooting occurred. At approximately 9:30 a.m., the appellant was escorted to the Sand Springs Police Department. He requested to make a telephone call at approximately 3:00 p.m., but was informed he could not do so until he had talked to a detective.

The appellant was interrogated by detectives at approximately 4:45 p.m. At that time, he initialed and signed a written waiver of rights; and gave the detectives a written account of how the shooting occurred. The appellant was then interrogated, and sent back to his cell to "think." As he was being locked in the cell, the appellant indicated that he wanted to make a second statement. He was again given a Miranda warning. He made an oral statement, which was tape recorded; and then made a second handwritten statement, based on the oral statement.

The appellant was allowed to talk to his mother at 8:00 p.m. He was arraigned at 1:00 p.m. on June 19.

I.

The appellant's first assignment of error is divided into three subparts in which he asserts: A) his right to counsel was violated during the interrogations which produced his statements; B) the statements were involuntary and coerced; and C) the taped statement was improperly admitted at trial because it contained references to a polygraph examination; and further, that the prosecutor improperly questioned a witness concerning the polygraph test.

A.

The appellant alleges that as he was being read his rights prior to interrogation, he made a statement which amounted to

an "equivocal request" for an attorney.¹ He cites several federal cases in which defendants who made similar statements were held to have been deprived of their right to counsel when

¹ The following is excerpted from the transcript of a special hearing held on May 12, 1982.

- Q. (Mr. Salisbury) Scott, you've been talking about they read each right to you individually and you initialled it; is that the numbered portion at the bottom you are speaking about?
- A. (Appellant) Yes, sir, it is.
- Q. After you initialled all these lines, what happened next?
- A. Detective Taylor read—started reading this waiver part of it.
- Q. Okay, would you read that portion out loud to me now?
- A. I read the statement of my rights shown before: I understand what my rights are; I am willing to answer questions, make a statement; I do not want a lawyer. I understand and know what I'm doing; no promises or threats have been made to me, no pressure of any kind has been used against me.
- Q. Scott, when that paragraph was read out loud to you on June 17, did you make any statements to Officer Taylor or Officer Darland?
- A. Yes, I did.
- Q. Relate to the Court what those statements were and how they came about.
- A. When Detective Taylor read the part that I don't want a lawyer I stopped him and told him—I said: I'm thinking I will need a lawyer.
- Q. You said I think I'll be needing a lawyer?
- A. Yes.
- Q. What was Detective Taylor's response to that statement?
- A. He told me not to worry about it; I could take care of that later.
- Q. When he said that, Scott, what did you think and what was your mental process at that point in time?
- A. I thought they were just doing this to figure out for their own what happened and may statement wouldn't hurt me later. (Tr. Hearing May 12, pp. 16-17).

interrogation continued.² We note, however, that upon cross-examination of the appellant on this matter during that hearing, the appellant stated that his remark "I'm thinking I will need a lawyer" was not a request for the detectives to secure him an attorney at that point.³ This is substantiated by the fact that the appellant subsequently signed the waiver of rights form. See generally, *Lee v. State*, 560 P.2d 226 (Okla. Cr. 1977). Moreover, upon being returned to his cell following the initial interrogation, the appellant expressed a desire to communicate further with the detectives; was again given a Miranda warning; and made subsequent statements which were more

² *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1974); *U.S. v. Clark*, 499 F.2d 802 (4th Cir. 1974); *Thompson v. Wainwright*, 601 Cir. 1979); *U.S. v. Prestigiaco*, 504 F.Supp. 681 (E.D.N.Y. 1981); and *U.S. v. Hinckley*, 672 F.2d 115 (D.C.App. 1982).

³ The transcript reads in pertinent part as follows:

- Q. (Mr. Moss) Now, when you said I think I'll be needing a lawyer; why was that?
- A. (Appellant) Because I thought I'd be needing a lawyer.
- Q. When did you think you'd be needing a lawyer?
- A. After spending all day in the cell.
- Q. What did you think you needed a lawyer for?
- A. To defend me.
- Q. Did you request Officer Taylor at that time to get you a lawyer or notify somebody you wanted a lawyer?
- A. No, sir.
- Q. Is that what you meant by that?
- A. That I was asking them to get me a lawyer?
- Q. Yes.
- A. No, sir.
- Q. That was not a request to Detective Taylor for him to secure a lawyer, a public defender or whatever was it at that time?
- A. No, sir. (Tr. May 12 hearing pp. 24-25).

incriminating than the first. See, *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).⁴

In light of the above, we do not believe the appellant's statements were obtained in violation of his sixth amendment right to counsel.

B.

In support of his contention that his statements were coerced and involuntary, the appellant points to "psychological terror tactics" employed by investigating officers; the fact that he was arraigned in Tulsa on June 19, approximately 52 1/2 hours after his initial arrest; and that he was not allowed to make a telephone call within six hours of his incarceration, in violation of 59 O.S. 1981, § 1338. He argues these factors render the present case indistinguishable from *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513, (1963). However, we do not find the circumstances surrounding the incarceration and interrogation of the appellant to have been violative of the appellant's rights as they were in *Haynes*.⁵

⁴ In *Edwards*, the Supreme Court stated that one who has previously asserted his right to counsel may be subject to further interrogation if the accused initiates further communication, exchanges or conversation with the authorities. In this case the appellant informed the authorities that he had "might as well tell the truth" after the first interrogation had ended.

⁵ The circumstances surrounding the defendant's confession in *Haynes*, which prompted the Supreme Court to reverse his conviction were that the defendant was held incommunicado for sixteen hours between the time of his arrest and his signing of a confession; that he several times requested to call his attorney and his wife; that the police refused to allow him to call unless and until he "cooperated" by signing a written confession; that even after the defendant had signed a written confession and had a preliminary arraignment, he was denied contact with the outside world; and that he was held incommunicado a total of five or seven days after his arrest.

In this case, even though the appellant was held for approximately 52 1/2 hours before he was arraigned, he has failed to demonstrate any resulting prejudice. Mere delay between the time of arrest and arraignment, without a showing by the accused of prejudice resulting therefrom, is insufficient to raise an inference that a confession obtained during that time was involuntary. See, *Stidham v. State*, 507 P.2d 1312 (Okl. Cr. 1973); *Logan v. State*, 493 P.2d 842 (Okl. Cr. 1972), and cases cited therein. Unlike the accused in *Haynes*, supra, the appellant was not held incommunicado between the times he was arrested and arraigned. He was permitted to talk to his mother at approximately 8:00 p.m. on the evening of his arrest. We do not believe that the fact that the appellant was denied a telephone call within the six hour period provided by 59 O.S. 1981, § 1338, demonstrates coercion or prejudice to the appellant. We find it unfortunate that the Sand Springs Police failed to scrupulously follow the procedure outlined in the statutes, and do not encourage such noncompliance; but in light of the fact that the appellant desired to telephone his mother, not an attorney,⁶ and indeed never requested an attorney,⁷ we do not believe this contributed an atmosphere of coercion.

We have reviewed the remarks alleged by the appellant to constitute "psychological terror tactics."⁸ We do not believe

⁶ 59 O.S. 1981, § 1338 provides that,

Each person arrested shall have an opportunity to use the telephone to call his attorney and bondsman before being placed in jail, or within six (6) hours thereafter. (Emphasis added).

⁷ See footnote, 3, supra. In addition, see generally *United States ex rel Riley v. Franzen*, 653 F.2d 1153 (7th Cir. 1981), cert. denied 454 U.S. 1067, 102 S.Ct. 617, 70 L.Ed.2d (1981), wherein it was held that a juvenile's request to see his father was not tantamount to a request for an attorney.

⁸ The remarks complained of by the appellant were that he would go to "Big Mac"; that he was fortunate Oklahoma had no death penalty; and that his statements were "bullshit."

these remarks were sufficient to evoke or coerce an involuntary confession from the appellant. Thus, in light of the above, we do not find that the fact the appellant made several statements during his incarceration to indicate they were coerced or involuntary.

C.

Matters concerning the polygraph test of which the appellant complains were brought before the jury when, in the taped statement introduced into evidence, the interrogating officers stated, and the appellant agreed, that a polygraph test would be given. Additionally, pursuant to defense counsel's timely objections, the trial court instructed the prosecutor to convey through examination of one of the detectives that the polygraph test was an interrogation tool, and that none was actually given the appellant. The prosecutor complied.⁹

Citing numerous cases in which this Court has held the admission of testimony and results concerning polygraph tests to be improper, the appellant argues the references to the possible polygraph test rendered the entire taped statement inadmissible. We find the case of *Coughran v. State*, 565 P.2d 688 (Okl.Cr.1977) to be controlling in this case. Here, as in

⁹THE COURT:

Might be advisable that the district attorney attempt to ask as few questions as possible by get across to this jury it was an interrogation tool, there was no ploygraph [sic] so they wouldn't be wondering whether there was or why haven't we been told the results since the Court made rulings admitting the tape, that decision made in front of the jury, the objections to States 20 will be overruled. (Tr. 221).

* * *

PROSECUTOR:

Q. In your questioning you made reference to a polygraph, that would be fair to say that is investigative, an interrogative type question, not forcing him to do so?

WITNESS:

A. I couldn't force him to do so at all. (Tr. 223).

Coughran, no test was given, thus no results published to the jury. Furthermore, we find that the question asked the detective, and the answer given concerning the investigative use of polygraph examinations did not refer to the appellant's right to remain silent. While we again emphasize that we do not condone the admission of testimony concerning polygraph tests, we find no prejudice resulting to the appellant to the brief references in this case, Coughran, supra.

II.

The appellant's second allegation of error is that the trial court erroneously admitted into evidence the rifle used in the murder, shell casings from the rifle, photographs of the crime scene and a letter written by the appellant to the victim's wife (the woman with whom the appellant had been living).

A.

The rifle and the shell casings were sitting on the couch beside the appellant when the police arrived at the appellant's apartment on the morning of the shootings. They were clearly visible and in plain view of the officers. The seizure was not error, and the evidence was properly introduced at trial. *Brown v. State*, 644 P.2d 566 (Okla. Cr. 1982); *Tucker v. State*, 620 P.2d 1314 (Okla. Cr. 1980).

The photographs of which the appellant complains are those taken of the appellant's apartment shortly after the police arrived and secured the scene. A police officer testified that they fairly and accurately depicted the murder scene as they found it. Admission of the photographs into evidence was not error. *Pate v. State*, 361 P.2d 1086 (Okla. Cr. 1961).

B.

Shortly after the appellant's arrest, a policeman conducted a warrantless search of a notebook found lying on the table in the kitchen of the appellant's apartment. The officer discovered a letter written by the appellant to the woman with whom he had been living which stated in part, "I'm begging for Earl (the

victim) to mess with me. I'm a big boy now and I can handle him one way or another."

The appellant's motion to suppress the letter was sustained at the preliminary hearing, at which time the State gave notice of intent to appeal the decision to this Court, pursuant to 22 O.S.1981, ch. 18, App. Rule 6 et. seq. That appeal was never perfected. Subsequently, at trial, the woman with whom the appellant had been living testified that she had read the letter in question several days prior to the shooting. The trial court admitted the letter, over the appellant's objections on the basis of the woman's independent sponsorship.

The appellant now complains that the trial court erroneously admitted the letter because it was illegally obtained; and furthermore, that the State's failure to appeal the adverse ruling at preliminary hearing resulted in the order suppressing the letter becoming a final order, thereby preventing introduction of the letter into evidence under any theory.

We do not agree with either contention. We are convinced that the trial court correctly permitted the State to introduce the letter. The Supreme Court stated in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, L.Ed.2d 441 (1963) that;

We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' (Citation omitted). 371 U.S. at 487-88.

The fact that the witness had previously read the letter, coupled with her prior testimony that the appellant had threatened to kill the victim at least two weeks prior to the murder; amply demonstrates that the introduction of the letter based on her testimony did not constitute "exploitation" of the illegal seizure, and that her sponsorship was purged of the "primary taint." *Wong Sun*, supra.

III.

In the appellant's third assignment of error, it is argued that A) the trial court erroneously excused two veniremen for cause during voir dire examination; B) the trial court erroneously refused to instruct the jury on Second Degree Manslaughter; and C) the bailiff improperly communicated with the jury through his non-verbal acts.

A.

The two veniremen who were excluded by the trial court expressed that they would have difficulty sitting as jurors on the appellant's trial, because of age similarities or past personal experiences.¹⁰ The statements made by the two veniremen

¹⁰ The dialogue pertaining to the excusal of the first venireman was as follows:

THE COURT:

Do any of you have reservations, morals, religious, philosophical, that would prevent you from considering imposing a sentence of life in this case or any term or imprisonment in the State penitentiary?

Ms. Tatom?

MS. TATOM: I don't think I can handle a decision. I just don't think I have any business on this case at all.

THE COURT: Is it the matter of life imprisonment we are talking about, punishment in general?

MS. TATOM: The whole thing in general. I'm a recent widow and I only have one son which is fairly close to his age. I don't feel I should be here at all.

THE COURT: Do you feel you should be excused for those reasons?

MS. TATOM: Yes, sir, I do.

THE COURT: You can be excused. (Tr. 26).

The dialogue relating to the excusal of the second venireman was:

THE COURT: Does anybody else think they might have any problems in this matter affixing and assessing punishment?

clearly demonstrate they would have had difficulty in reaching the issue of the appellant's guilt or innocence due to considerations beyond that of potential punishment. Thus, we do not believe the appellant's arguments based on the philosophy of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) are applicable in this case. The trial court did not abuse its discretion in excusing them, *Lewis v. State*, 586 P.2d 81 (Okla.Cr.1978); 22 O.S. 1981, § 659.

B.

In his argument that the trial court should have given the jury a second degree manslaughter instruction, he offers three alternative theories, based on the testimony of the medical examiner, the details of which we need not delineate here.

MS. JACKSON: Yes, I don't feel that I could decide on guilt. I don't think in myself I could decide his innocence or guilt and punishment.

THE COURT: Do you understand that first of all you have got fellow jurors, eleven of them, that are going to deliberate with you, although every juror has to make their own decision, it is a matter of group deliberation. You've got rules and guidelines that the Court will give you on the law. Do you think in spite of that that you feel you couldn't sit as a completely fair and impartial juror in this case, Ms. Jackson?

MS. JACKSON: He's about the same age as I am and looks familiar to me. I can't figure out where I've seen him before. I don't feel I could.

THE COURT: You are asking me to excuse you?

MS. JACKSON: Please.

MR. SALISBURY: May we approach the bench?

(Whereupon the following was had at the bench out of the hearing of the jury.)

MR. SALISBURY: For the record, at this time, I will object to the excusing of the juror Jackson on the grounds that it's the right of the juror to have beliefs and compulsions internal to themselves to where they might find it difficult to sentence. The question becomes nevertheless could she sentence in spite of her internal feelings. I would believe that the juror would be excused in error and object to the excusing of that juror.

THE COURT: The objection is noted. (Tr. 28-29).

We need only note that the appellant's only defense at trial was that he intentionally fired the weapon at the victim in self-defense. The appellant introduced a photograph of the victim to demonstrate the disparity in size between the victim and himself, the statements given the police indicate the appellant claimed he was acting in self-defense, and counsel devoted considerable time in his opening and closing statements to that theory. In a case such as this, where the evidence demonstrates that the appellant intended to shoot at the victim, we cannot say that the evidence supports a second degree manslaughter instruction based on negligence. See, *Cowles v. State*, 636 P.2d 342 (Okla. Cr. 1981). The instruction was properly refused.

C.

The appellant lastly complains that it came to his attention during the jury deliberations in this case, and has been subsequently confirmed by his independent personal inquiry and observation, that many bailiffs attempt to influence which juror becomes foreman of the jury by initially handing that juror exhibits throughout the trial. He asserts that such a practice occurred in the present case, and that the person whom the bailiff attempted to get selected was indeed chosen foreman. He argues that such an activity constituted improper "non-verbal" communication with the jury, and resulted in undue emphasis by the jury on the opinion of the "preselected" juror.

The appellant admits that no cases on this point are to be found, but argues that it was nonetheless improper. We are convinced that, even assuming the appellant's allegation concerning this matter in this case to be true, ¹¹ no prejudice has

¹¹ Since the appellant failed to subpoena the bailiff who allegedly committed the act, this Court is left only to the unsupported allegation of the appellant's attorney. We have previously expressed our reluctance to accept unsupported assertions of defense counsel in similar situations. See, *Smith v. State*, 659 P.2d 330 (Okla. Cr. 1983).

been shown to have occurred therefrom. The assignment of error is without merit.

The judgment and sentence is AFFIRMED.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA
COUNTY, OKLAHOMA THE HONORABLE JOE JENNINGS,
DISTRICT JUDGE**

THOMAS SCOTT KAPOCSI, appellant, was convicted of Murder in the First Degree in the District Court of Tulsa County, Case No. CRF-80-2008. He was sentenced to life imprisonment, and appeals. AFFIRMED.

THOMAS E. SALISBURY
SAND SPRINGS, OKLAHOMA
Attorney for Appellant

MICHAEL C. TURPEN
ATTORNEY GENERAL
WILLIAM H. LUKER
ASSISTANT ATTORNEY GENERAL
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

OPINION BY BUSSEY, P.J.
CORNISH, J., CONCURS
BRETT, J., CONCURS

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

NO. F-82-9

THOMAS SCOTT KAPOCSI,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

File Stamped
Sep 19 1983

**ORDER DENYING PETITION FOR REHEARING AND
DIRECTING ISSUANCE OF MANDATE**

NOW on this 19th day of September, 1983, after having examined the petitioner's petition for rehearing in the above styled and numbered case, and being fully advised in the premises, this Court finds that it should be, and the same hereby is **DENIED**. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

**WITNESS OUR HANDS AND THE SEAL OF THIS
COURT this 19th day of September, 1983.**

/s/ HEZ J. BUSSEY, PRESIDING JUDGE

/s/ TOM R. CORNISH, JUDGE

/s/ TOM BRETT, JUDGE

ATTEST:

/s/ ROSS N. LILLARD JR.
Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

"No person shall . . . be compelled any criminal case to be a witness against himself"

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law"

Rule 6, Rules of the Court of Criminal Appeals:

"The State of Oklahoma, by . . . the district attorney . . . shall have the right to appeal an adverse ruling or order of a magistrate sustaining a motion to suppress evidence"

Rule 6.1, Rules of the Court of Criminal Appeals:

"At the time the adverse ruling or order is made by the magistrate, the State shall, in open court, give notice of its intention to appeal the decision. The magistrate shall enter the notice in the proper court docket, continue the preliminary hearing, and retain the accused on his/her present bond, or if he/she be in custody, return the accused to custody.

Rule 6.2, Rules of the Court of Criminal Appeals:

"Thereafter, within five (5) days from the magistrate's adverse decision, the State shall file with the court clerk a written application to appeal from the adverse ruling . . . and a copy of the application shall immediately be presented by the State to the Presiding Judge . . . to be docketed for hearing and decision within twenty (20) days from the filing of the application"

Rule 6.3, Rules of the Court of Criminal Appeals:

"In the event the State does not file the application to appeal as provided, the State shall have waived any right to appeal from the magistrate's adverse decision. That magistrate's order shall then be final."

22 O.S. § 181:

"The defendant must, in all cases, be taken before the magistrate without unnecessary delay."

59 O.S. § 1338:

"Each person arrested shall have an opportunity to use the telephone to call his attorney and bondsman before being placed in jail, or within six hours thereafter."

APPENDIX D

PRESERVATION OF ERRORS BELOW

The preliminary hearing transcript is designated PH, the motion hearing transcript is designated MOT, the trial transcript is designated TR, and the Motion for New Trial Hearing is designated NT.

SUPPRESSION OF DEFENDANT'S STATEMENTS

Counsel filed a Motion to Suppress prior to preliminary hearing. [PH, pp. 3, lines 14-17]. Counsel objected throughout the preliminary hearing to the admission of these statements. [See i.e., PH, pp. 26, line 15-p. 27, line 4; PH, pp. 33, line 33-pp. 34, line 20; PH, pp. 82, line 22-pp. 83, line 11; PH, pp. 86, line 15-pp. 87, line 23; PH, pp. 170, lines 1-4]. The magistrate took these objections under advisement and at the conclusion of the preliminary hearing made following ruling:

THE COURT: . . . I'm taking your motion to suppress statements based on your last argument to go to State's Exhibit Two, number one that's the rights waiver. States's Exhibit Two being the rights waiver, and Three, Four, Five, and Six which are the written statements and tape recorded statements. With respect to Two through Six I'll cite the authority of North Carolina versus Butler an April 24th, 1979, United States Supreme Court case, Fare, F-A-R-E, versus as Michael C. period, a June 29th, 1979, U.S. Supreme Court case. I'll supply you with the cites later either of you gentlemen want them. Which indicates that each case must be examined on a somewhat adhoc basis, looking in all the surrounding facts and circumstances to determine if the statements made were knowingly made, voluntarily made, and whether or not the Defendant had the capacity to properly waive his right to—against self incrimination.

I will overrule your motion to suppress based on the authority of those cases. Specifically, adding to what you argued, the fact that I took into account the demeanor of

the Defendant on the tapes, as reflected by his voice tone and inflection as it came out on the tape. [PH, pp. 172, line 15-pp. 173, line 14].

Thereafter, on May 12, 1981, a motion hearing was held before the trial court regarding the suppression of the defendant's statements. This resulted in the following:

THE COURT: Anything else?

MR. SALISBURY: Your Honor, I think it is properly submitted at this time; no.

THE COURT: The defendant's motion to suppress the statement will be overruled and denied.

MR. SALISBURY: As to both statements, Your Honor?

THE COURT: Yes, sir. [MOT, pp. 45, lines 4-10]

During trial counsel again objected to the admission of the defendant's statements and was consistently overruled by the trial court. [See, TR, pp. 202, lines 6-13; TR, pp. 203, lines 7-15; TR, pp. 204, line 23-pp. 205, line 3; TR, pp. 214, line 8-pp. 215, line 23; TR, pp. 223, lines 4-10]. Counsel for Petitioner urged this argument to the trial court in his Motion for New Trial and was again overruled. [NT, pp. 2, lines 9-18; overruled on pp. 6, lines 5-7]. The issues were finally raised before the Oklahoma Court of Criminal Appeals as the first proposition of error in the brief in chief. The Oklahoma court rejected petitioner's Miranda claim, stating:

"We note, however, that upon cross examination of the appellant on this matter during that hearing, the appellant stated that his remark 'I'm thinking I will need a lawyer' was not a request for the detectives to secure him an attorney at that point. [Fn. omitted]. This is substantiated by the fact that the appellant subsequently signed a waiver of rights form. [Citation omitted]. Moreover, upon being returned to his cell following the initial interrogation, the appellant expressed a desire to communicate further with the detectives; was again given a Miranda warning; and made subsequent statements which were more incriminating than the first. See, *Edwards v. Arizo-*

na, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)."
[See Appendix A].

Similarly, the Oklahoma court rejected petitioner's claim of involuntariness with respect to his statements, stating:

"However, we do not find the circumstances surrounding the incarceration and interrogation of the appellant to have been violative of the appellant's rights as they were in *Haynes*. [Fn. omitted] . . . We have reviewed the remarks alleged by the appellant to constitute "psychological terror tactics." [Fn. omitted]. We do not believe these remarks were sufficient to evoke or coerce an involuntary confession from the appellant. Thus, in light of the above, we do not find that the fact the appellant made several statements during his incarceration to indicate they were coerced or involuntary." [Appendix A].

Petitioner re-urged both the *Miranda* and involuntariness argument to the appellate court in his petition for re-hearing which was denied. [Appendix B].

SUPPRESSION OF SEIZED EVIDENCE

Counsel filed a Motion to Suppress prior to preliminary hearing. [PH, pp. 3, lines 14-17]. Counsel objected throughout the preliminary hearing to the admission of this evidence. [See i.e., PH, pp. 24, line 16-p. 25, line 2; PH, pp. 140, line 5-pp. 146, line 21]. The magistrate took these objections under advisement and at the conclusion of the preliminary hearing made following ruling:

THE COURT: With respect to State's Exhibit Number One, that is the letter found in the apartment, initially discovered by Officer Darland. In that matter we have reviewed *Mincey, M-I-N-C-E-Y, versus Arizona*. Which in large measure supports the Defendant's argument for suppression. Warrantless searches can only be valid if they are by consent. We do not have that here. If they are incident to a valid arrest. That's not proper here. If there is probable cause and exigent circumstances. We do not have that here. None of these circumstances surrounding this search were—rise to the level of exigency which

makes an exception to a warrant requirement. There was no hot pursuit, it's not a stop and frisk situation. It's obviously not a plain view situation. And it is nothing that comes under the pervue (sic) of Opperman . . . Dombrowski . . . Harris or Cooper which are cases that present court has carved out a new category from.

I will sustain the Defendant's motion to suppress State's Exhibit Number One only, that being the letter discovered by Officer Darland. [PH, pp. 173, line 15-pp. 174, line 11].

Thereafter, on May 12, 1981, a motion hearing was held before the trial court regarding the suppression of the defendant's statements. This resulted in the following:

MR. SALISBURY: At this time, the defendant filed previously on May the 5th a motion to suppress search and seizure in this case and suppress a statement of the defendant and a motion to dismiss the case based upon suppression. [MOT, pp. 3, lines 6-9].

[Lengthy argument by defense counsel].

* * * * *

THE COURT: Well, do you want me to rule on the admission of evidence that hasn't been offered yet?

MR. SALISBURY: I think I have a right to the ruling under the Constitution in that it is prejudicial for Mr. Moss to bring the rifle in and lay it down in the hearing here; that alone if it is not introduced, the mere fact that it is here carries a prejudicial value if it was an illegal search and seizure; the jury should not be present with it.

THE COURT: I can understand after reading the transcript of the preliminary hearing; I'm not sure I would have ruled in the same way; I can understand why Judge Graham ruled as he did in suppression of the letter obtained during the search of the apartment; but the motion to suppress, at least those items that you mentioned, the weapons, the

photographs, the bullet, the shell—the motion to suppress those items will be overruled and denied.

MR. SALISBURY: Note my exception, Your Honor. [MOT, pp. 7, line 10-pp. 8, line 2].

During trial counsel again objected to the admission of the seized evidence and was consistently overruled by the trial court. [See, TR, pp. 170, line 3-pp. 172, line 10; TR, pp. 173, line 4-pp. 175, line 15; TR, pp. 183, lines 10-14; TR, pp. 184, line 19-pp. 185, line 1; TR, pp. 185, lines 19-25]. Counsel for Petitioner urged this argument to the trial court in his Motion for New Trial and was again overruled. [NT, pp. 2, lines 9-18; overruled on pp. 6, lines 5-7]. The issues were finally raised before the Oklahoma Court of Criminal Appeals as the second proposition of error in the brief in chief. The Oklahoma court rejected petitioner's claim, stating:

"They [rifle and shell casings] were clearly visible and in plain view of the officers. The seizure was not error, and the evidence was properly introduced at trial. *Brown v. State*, 644 P.2d 566 (Okl.Cr.1982); *Tucker v. State*, 620 P.,2d 1314 (Okl.Cr. 1980).

The photographs of which the appellant complains are those taken of the appellant's apartment shortly after the police arrived and secured the scene. A police officer testified that they fairly and accurately depicted the murder scene as they found it. Admission of the photographs into evidence was not error. *Pate v. State*, 361 P.2d 1086 (Okl.Cr.1961).

The trial court admitted the letter, over the appellant's objections on the basis of the woman's independent sponsorship. . . . The fact that the witness had previously read the letter, coupled with her prior testimony that the appellant had threatened to kill the victim at least two weeks prior to the murder; amply demonstrates that the introduction of the letter based on her testimony did not constitute "exploitation" of the illegal seizure, and that her sponsorship was purged of the "primary taint." Wong Sun, *supra*." [Appendix A].

Petitioner re-urged both the Miranda and involuntariness argument to the appellate court in his petition for re-hearing which was denied. [Appendix B].

RULE 6 DUE PROCESS VIOLATION

Counsel argued at trial that the magistrate's ruling bound the trial court; however, the trial overruled the objection. [See, TR, pp. 170, line 3-pp. 172, line 10]. Counsel subsequently re-urged this issue in his written motion for new trial which was overruled in toto by the trial court. [See, MOT pp. 6, lines 5-7]. This issue was presented to the Oklahoma Court of Criminal Appeals in the brief in chief and in the petition for rehearing; however, the appellate court failed to address the issue in either decision.

JURY SELECTION VIOLATION

Counsel during voir dire objected to the trial court's excusal of the juror Jackson, stating:

MR. SALISBURY: For the record, at this time, I will object to the excusing of the juror Jackson on the grounds that it's the right of the juror to have beliefs and compulsions internal to themselves to where they might find it difficult to sentence. The question becomes nevertheless could she sentence in spite of her internal feelings. I would believe that they (sic) juror would be excused in error and object to the excusing of that juror.

THE COURT: The objection is noted. [TR, pp. 29, lines 8-16].

Counsel did not object earlier to the excusal of juror Tatom which was on the same grounds as juror Jackson. However, the excusal of both jurors was raised to the Oklahoma Court of Criminal Appeals which addressed the issue as to both jurors, stating:

The two veniremen who were excluded by the trial court expressed that they would have difficulty sitting as jurors on the appellant's trial, because of age similarities or past personal experiences. [Fn. omitted]. The statements made by the two veniremen clearly demonstrate they would have had difficulty in reaching the issue of the appellant's guilt or innocence due to considerations beyond that of potential punishment. Thus, we do not

believe the appellant's arguments based on the philosophy of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) are applicable in this case. The trial court did not abuse its discretion in excusing them, *Lewis v. State*, 586 P.2d 81 (Okla.Cr.1978); 22 O.S. 1981, § 659." [Appendix A].

Thus, all issues presented to this Court were properly raised below.

APPENDIX E

The preliminary hearing transcript is designated PH, the motion hearing transcript is designated MOT, and the trial transcript is designated TR.

* * * * *

PH, pp. 53, lines 16-22:

MR. SALISBURY: When you arrived. Take your seat, Officer. You asked the defendant to step out in the hallway?

OFFICER TAYLOR: Yes, sir.

Q: And at that point and time was when the medical examiner's office people or ambulance?

A: The ambulance.

Q: The ambulance attendant arrived.

* * * * *

PH, pp. 56, lines 2-10:

MR. SALISBURY: But, he [the defendant] had been removed from the scene?

OFFICER TAYLOR: That's right.

Q: And the body was re—was being removed at that point and time?

A: No, no. The ambulance left. We left the body where it was waiting for the medical examiner.

Q: Okay, you checked out the apartment and there was no one else in it at that time?

A: That's correct.

* * * * *

PH, pp. 24, lines 5-13:

MR. MOSS: All right. And what else did you do there in the course of your investigation?

OFFICER TAYLOR: I drew a diagram first and then Officer Burton transported Mr. Kapocsi back to the police department. I drew the diagram. I had Detective Darland take pictures of the crime scene. And just generally made a crime scene span of the apartment.

Q: Was the weapon recovered?

A: Yes, it was.

* * * * *

PH, pp. 25, lines 4-22:

MR. MOSS: Did you find any bullets?

OFFICER TAYLOR: Yes. There was one spent cartridge approximately one and a half feet away from the weapon, in the front room area.

Q: All right and did you examine the weapon itself to see if it had any rounds in it?

A: I didn't no. One of the other officers.

Q: They did?

A: Yeah.

Q: Do you know if any were found?

A: I'm not sure on that.

Q: All right.

A: I don't remember.

Q: Now, was there any other physical evidence taken there at the scene?

A: Yes. Detective Darland observed a note lying on—the (sic) on a table or desk in the kitchen area.

Q: And did he turn that over to you?

A: Yes, he did.

* * * * *

PH, pp. 68, line 21-pp. 69, line 20:

MR. MOSS: And what you do there at this scene in way of participating in the investigation?

OFFICER DARLAND: I took some photographs of the scene, and of the body, and obtained some evidence of the scene there.

Q: All right and what was that, please?

A: One of the evidence was a letter that was written to Jackie, by Scott.

Q: Let me hand you what has been marked, I believe introduced as State's Exhibit Number One, look at that please?

A: Okay, this is the letter that I'm referring to.

Q: And where was it found?

A: This was found in the kitchen on a table there.

Q: All right, I note that it is a notebook, piece of notebook paper?

A: Yes, sir.

Q: And was that in a spiral notebook, or had it be (sic) torn loose when you saw it?

A: It was in a spiral notebook.

Q: And you ripped it out of the notebook is that correct?

A: I did or Detective Taylor one of the two, I turned it to him or showed him of it.

* * * * *

PH, pp. 150, lines 12-14:

MR. SALISBURY: Do you recall the time you transported him [defendant] back to the police department.

OFFICER BURTON: I went 10-15, at 09:47.

* * * * *

PH, pp. 150, lines 15-22:

MR. SALISBURY: Okay, and at from 9:47 when you arrived back there with the Defendant, how long did you stay with the Defendant.

OFFICER BURTON: Until, I guess about two or three hours.

Q: Okay, during that two or three hour period from 9:47 to say 11:47 or thereabouts did the Defendant—was the Defendant allowed to make a telephone call?

A: Not to my recollection.

* * * * *

PH, pp. 156, lines 4-17:

MR. SALISBURY: Would you look back, Chief [Sand Springs Chief of Police Gerald Flanigan], into the date of June 17th, 1980, in the phone log and determine whether or not the Defendant, Thomas Scott Kapocsi made, a phone call?

CHIEF FLANIGAN: June the 17th?

Q: June the 17.

A: There is no phone call logged for anyone on the date of the 17th of June, 1980.

Q: Okay, Chief, would you look at June 18th, 1980?

A: All right.

Q: Do you see any phone call logged on that day for the Defendant, Thomas Scott Kapocsi?

A: There were four phone calls logged for the 18th none are for the Defendant.

* * * * *

PH, pp. 163, lines 1-22:

MR. SALISBURY: And what time did you come on duty that day, Connie?

CONNIE LEMASTER: 3:45

Q: And when you came on duty were you given any instructions or told anything with regard to the Defendant, Scott Kapocsi?

A: I was aware that he was there and what he was there for. Thereafter, sometime later, I was told that he was not to be given any phone calls, that the detectives were taking care of everything.

Q: And subsequent to you coming on duty did you come into contact with the Defendant, Scott Kapocsi?

A: Yes, I did. It's our duty to check them out hourly all the prisoners.

Q: Okay, and when you came in contact with Scott Kapocsi did he request to make a phone call?

A: In his statements, yes he did, he asked.

Q: And did you respond in any way to his request to you to make a phone call?

A: I advised him that the detectives would give him a phone call whenever they had time or whenever—it was up to them. I'm not authorized to do that.

* * * * *

MOT, pp. 14, lines 14-22:

MR. SALISBURY: Tell us the first person you spoke to and what that conversation was?

SCOTT KAPOCSI: The first person I spoke to was Connie Lemaster.

Q: What did you tell Connie, Scott?

A: I asked her if I could call my mom.

Q: What was Connie's response?

A: She told me I'd have to wait and talk to the detectives.

Q: Who was the next person you spoke to, Scott?

A: The man who brought the food in.

* * * * *

MOT, pp. 15, lines 2-8:

MR. SALISBURY: When he brought the food in, what did you say to him?

SCOTT KAPOCSI: I asked him if I could call my mom.

Q: And do you recall what his response was?

A: He told me I would have to talk to the detectives.

Q: And after you spoke with him, how long was it before you were taken out of your cell?

A: About half an hour or 45 minutes.

* * * * *

MOT, pp. 15, lines 11-22:

MR. SALISBURY: When they took you out of your cell where did they take you, Scott?

SCOTT KAPOCSI: Into a small office.

Q: This was approximately what time?

A: 4:45, around in there.

Q: Who was present in that office?

Q: Detective Darland and Detective Taylor.

Q: And when you entered that office, what was the first thing the officers did?

A: They brought a sheet up, some type of writing sheet.

Q: What did they do with that sheet, Scott?

A: They read each line and had me initial it after I read it.

* * * * *

MOT, pp. 16, line 9-pp. 17, line 11:

MR. SALISBURY: After you initialled all these lines, what happened next?

SCOTT KAPOCSI: Detective Taylor read—started reading this waiver part of it.

Q: Okay, would you read that portion out loud to me?

A: I read the statement of my rights shown before; I understand what my rights are; I am willing to answer questions, make a statement; I do not want a lawyer. I understand and know what I'm doing; no promises or threats have been made to me, no pressure of any kind has been used against me.

Q: Scott, when that paragraph was read out loud to you on June 17, did you make any statements to Officer Taylor or Darland?

A: Yes, I did.

Q: Relate to the Court what those statements were and how they came about.

A: When Detective Taylor read the part that I don't want a lawyer I stopped him and told him—I said: I'm thinking I will need a lawyer.

Q: You said I think I'll be needing a lawyer.

A: Yes.

Q: What was Detective Taylor's response to that statement?

A: He told me not to worry about it; I could take care of that later.

Q: When he said that, Scott, what did you think and what was your mental process at that point in time?

A: I thought they were just doing this to figure out for their own what happened and my statement wouldn't hurt me later.

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MOT, pp. 17, lines 18-23:

MR. SALISBURY: Scott, after Officer Taylor's response to your statement, what happened next?

SCOTT KAPOCSI: He went ahead and read the rest of it and had me sign it.

Q: Nothing occurred at this point that made you feel that your statement would be used against you?

A: No, sir.

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MOT, pp. 24, line 13-pp. 25, line 19:

MR. MOSS: Now, when you said I think I'll be needing a lawyer; why was that?

SCOTT KAPOCSI: Because I thought I'd be needing a lawyer.

Q: What did you mean, I think I'll be needing a lawyer?

A: I thought I would be needing a lawyer.

Q: When did you think you'd be needing a lawyer?

A: After spending all day in the cell.

Q: What did you think you needed a lawyer for?

A: To defend me.

Q: Did you request Officer Taylor at that time to get you a lawyer or notify somebody you wanted a lawyer?

A: No, sir.

Q: Is that what you meant by that?

A: That I was asking them to get me a lawyer?

Q: Yes.

A: No, sir.

Q: That was not a request to Detective Taylor for him to secure a lawyer, a public defender or whatever was it at that time?

A: No, sir.

Q: It was just a comment that you were in trouble and would eventually be needing a lawyer; isn't that about right, Mr. Kapocsi?

A: That I would like to have a lawyer.

Q: Now like to have one, looking back you realize you should have one; right?

A: Looking back to that day; yes, sir.

Q: At that time though, what I am talking about is that it was a general comment on your part to the effect of: I am in trouble and going to be needing a lawyer before this thing is over?

A: I don't remember it as that.

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MOT, pp. 18, line 19-pp. 19, line 12:

MR. SALISBURY: After giving you these first statements that we call them, did Officer Taylor or Officer Darland make any threats or statements to about the case?

SCOTT KAPOCSI: They told me I was lying and they could prove me wrong. The Medical Examiner could prove me wrong. Officer Taylor told me that I ought to be glad Oklahoma hasn't got capital punishment, but nevertheless I'd be in McAlester for a long time. They said Jackie said I was lying and had statements to contradict mine.

Q: Did either of the officers mention a polygraph test?

A: Yes, Detective Darland asked if I had ever taken one. I told him I had. He said: That's good, you are going to have to take another one.

Q: He said have you had to take a polygraph?

A: Yes, sir.

Q: When all these statements were made, Scott, this was after the first statement and before the second statement was given?

A: Yes, sir.

* * * * *

MOT, pp. 19, lines 15-21:

MR. SALISBURY: What was going through your mind when these statements were made to you, Scott?

SCOTT KAPOCSI: I couldn't believe they didn't believe me. They acted like they did at first and it was a complete turnaround.

Q: Were these threats and statements by the officers the reason for you giving the second statement?

A: Yes, sir.

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TR, pp. 26, lines 3-19

THE COURT: Do any of you have any reservations, morals, religious, philosophical, that would prevent you from considering imposing a sentence of life in this case or any term or imprisonment in the State penitentiary?

Ms. Tatom?

MS. TATOM: I don't think I can handle a decision. I just don't think I have any business on this case at all.

THE COURT: Is it the matter of life imprisonment we are talking about, punishment in general?

MS. TATOM: The whole thing in general. I'm a recent widow and I only have one son which is fairly close to his age. I don't feel I should be here at all.

THE COURT: Do you feel you should be excused for those reasons?

MS. TATOM: Yes, sir, I do.

THE COURT: You can be excused.

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TR, pp. 28, line 12-pp. 29, line 16:

THE COURT: Does anybody else think they might have any problem in this matter affixing and assessing punishment?

MS. JACKSON: Yes, I don't feel that I could decide on guilt. I don't think in myself I could decide his innocence or guilt and punishment.

THE COURT: Do you understand that first of all you have got fellow jurors, eleven of them, that are going to deliberate with you, although every juror has to make their own decision, it is a matter of group deliberation. You've got rules and guidelines that the Court will give you on the law. Do you think in spite of that that you feel you couldn't sit as a completely fair and impartial juror in this case, Ms. Jackson?

MS. JACKSON: He's about the same age as I am and looks familiar to me. I can't figure out where I've seen him before. I don't feel I could.

THE COURT: You are asking me to excuse you?

MS. JACKSON: Please.

MR. SALISBURY: May we approach the bench?

(Whereupon the following was had at the bench out of the hearing of the jury.)

MR. SALISBURY: For the record, at this time, I will object to the excusing of the juror Jackson on the grounds that it's the right of the juror to have beliefs and compulsions internal to themselves to where they might find it difficult to sentence. The question becomes nevertheless could she sentence in spite of her internal feelings. I would believe that they (sic) juror would be excused in error and object to the excusing of that juror.

THE COURT: The objection is noted.